

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 18, 2008

**MARCELLUS BETTY v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2001-A-276 J. Randall Wyatt, Jr., Judge**

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**No. M2007-02200-CCA-R3-PC - Filed October 16, 2008**

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The petitioner, Marcellus Betty, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief from his convictions for two counts of aggravated burglary; one count each of aggravated robbery, evading arrest, and reckless endangerment; and resulting effective forty-nine-year sentence. On appeal, the petitioner contends that he received the ineffective assistance of counsel because (1) his trial attorney failed to investigate the facts of his case and call an important witness to testify on his behalf and (2) he was forced to testify. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Harold Donnelly, Nashville, Tennessee, for the appellant, Marcellus Betty.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

The petitioner and Antonio Fuller were tried jointly for crimes committed against the victims. In the defendants' direct appeal, our supreme court stated the following facts:

During the early morning hours of December 22, 2000, the defendants . . . broke into the Goodlettsville townhouse of George Woods, III, and Quantrissa Sherrell Woods. Mr. Woods was

sleeping, and Mrs. Woods was nursing their ten-day-old son. Fuller and Betty ran into the bedroom. Betty approached Mrs. Woods' side of the bed, pointing a rifle at her and the baby. Fuller walked to the other side, aiming a shotgun at Mr. Woods. Betty demanded, "Where's the dope? Where's the money?" Mrs. Woods responded, "We don't have any drugs or money. You know, we just work. All the money we have is up on the dresser, about seventy dollars." Betty threatened to kill the couple if they did not give him drugs and money.

When Betty asked where "Little Jason" was, Mr. Woods realized that the men had broken into the wrong townhouse. Mr. Woods told them that Little Jason's cousin lived in another townhouse in the complex and drove a car similar to his. Betty demanded that Mr. Woods show them the correct townhouse. Betty took the seventy dollars from the dresser and ordered Fuller to bind the couple with duct tape. Mrs. Woods' mouth was covered, and her arms were taped behind her. Mr. Woods' arms and legs were bound, and he was forced outside the townhouse. Mr. Woods estimated that forty minutes passed from the time the men entered the townhouse until Mr. Woods left with them.

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After Mr. Woods showed Fuller and Betty where Little Jason's cousin lived, the three men returned to the Woodses' townhouse. Betty took Mr. Woods up to the bedroom and placed him in the bed with his wife, who remained bound. Betty again threatened the couple, stating, "I'll kill you if you mess my sting up." Betty repeated the threats as he went back and forth sticking the barrel of the rifle in each victim's mouth. Betty ordered the couple to face the wall, and then he fled.

Mr. and Mrs. Woods worked together to remove the duct tape from each other. When free, the couple packed a bag and gathered their children. They were running toward the door when the police arrived. Upon seeing Fuller and Betty drive out of the parking lot of the complex, an officer attempted to pull them over. Both men were apprehended after a high-speed chase.

State v. Fuller, 172 S.W.3d 533, 534-35 (Tenn. 2005). A jury convicted the defendants of aggravated burglary, aggravated robbery, especially aggravated kidnapping of Mr. Woods, especially aggravated kidnapping of Mrs. Woods, evading arrest, and reckless endangerment. Id. On appeal,

a panel of this court reversed the defendants' convictions for the aggravated kidnapping of Mrs. Woods. Id. at 536. However, our supreme court reinstated those convictions. Id. at 538.

Subsequently, the petitioner filed a petition for post-conviction relief. The post-conviction court appointed counsel, and counsel filed an amended petition in which the petitioner claimed that he received the ineffective assistance of counsel because trial counsel (1) failed to meet with him to discuss the facts of his case, trial strategy, and plea offers; (2) failed to discuss lesser included offenses with him; and (3) failed to investigate the facts of his case and call witnesses to verify counsel's opening statement and the petitioner's testimony.

At the evidentiary hearing, trial counsel testified that he had been practicing law since 1989 and that eighty to ninety percent of his practice involved criminal law. On May 10, 2001, counsel was retained to represent the petitioner. At that time, the petitioner was serving an eight-year prison sentence. Counsel never met with the petitioner in prison but met with the petitioner whenever the petitioner appeared in court. Counsel met with the petitioner seven times between May and December 2001. During a meeting on July 26, 2001, counsel presented the petitioner with an offer from the State for the petitioner to plead guilty to two counts of especially aggravated kidnapping in return for a thirty-year sentence to be served at one hundred percent. The petitioner turned down the offer, and the State never made another plea offer. Counsel met with the petitioner again on April 23, 2002, and the morning of trial. During all of the meetings, counsel and the petitioner met privately and discussed the petitioner's case. The meetings lasted from fifteen minutes to one hour "depending on how long we had to talk . . . over the things that we had to talk about." Counsel also discussed lesser included offenses with the petitioner.

Counsel testified that the petitioner never gave him any information about what happened in the victims' apartment and that the petitioner always maintained he had nothing to do with the crimes. The petitioner told counsel the following: On the evening of December 21, 2000, the petitioner had been at the apartment of his cousin, Stephanie Gordon. Gordon's apartment was in the same apartment complex as the victims' apartment. The petitioner telephoned Antonio Fuller, and Fuller picked up the petitioner from Gordon's home. Fuller was sweating when the petitioner got into Fuller's car, and the two men drove away from the apartment complex. The police chased Fuller's vehicle, and Fuller wrecked. The petitioner claimed that Fuller committed the robbery prior to picking him up. Counsel acknowledged that the police found a rifle and a shotgun, the alleged weapons used during the robbery, in Fuller's car and that Fuller testified the petitioner participated in the robbery. The petitioner never told counsel the name of the person who drove the petitioner to Gordon's apartment on the evening of December 21.

Counsel testified that the petitioner gave him Gordon's telephone number. Counsel drove to The Greens of Rivergate apartment complex one time and "looked around at the apartments because [the petitioner] had indicated that Ms. Gordon's apartment was either 507 or 506." He said that no one was home but that he did not knock on her door. Counsel talked with Gordon once or twice over the telephone, but Gordon was "extremely vague" and never confirmed the petitioner's story. As a result, counsel was "extremely suspicious." At some point, Gordon's telephone went

out of service, and counsel was unable to contact her again. Counsel told the petitioner's family to have Gordon contact counsel or bring Gordon to counsel's office, but counsel never heard from Gordon. Counsel "got the idea" Gordon was afraid to testify untruthfully, and he did not try to obtain her telephone records. He acknowledged that if the petitioner's story was true, Gordon was an extremely important witness. As part of his investigation, counsel also "went by" the victims' apartment, which was close to Gordon's apartment. He did not hire an investigator for the case.

Counsel testified that he told the petitioner it was the petitioner's decision whether or not to testify at trial. However, given that Fuller's story differed from the petitioner's story, counsel told the petitioner he probably needed to testify. At trial, counsel explained the petitioner's story to the jury during opening statements. At that time, the petitioner had already decided to testify. Counsel did not force the petitioner to testify, and the petitioner testified because he wanted to tell the jury his side of the story.

On cross-examination, counsel testified that he thought he adequately investigated the petitioner's case and that the petitioner was very intelligent. He stated that he and the petitioner discussed discovery materials and that he gave the petitioner a copy of all discovery. Counsel wanted to talk with Gordon further, but no one gave him another telephone number for her.

Stephanie Gordon, the petitioner's first cousin, testified that she had lived in The Greens of Rivergate apartment complex for about nine years and that she still lived in apartment 507. She stated that she was a junior at Tennessee State University and that she would not lie for the petitioner. On the night of December 21, 2000, she and the petitioner watched television in her apartment. She stated that he probably arrived at 5:00 or 6:00 p.m. The petitioner used Gordon's cellular telephone, and he left "[a]round midnight, one o'clock" on December 22. She stated that she was sure he left no later than 1:00 a.m. because she never stayed up that late. Gordon thought she saw "his ride," and then she went to bed. Her apartment was a one- to two-minute drive from the victims' apartment. She stated that she spoke with the petitioner's attorney a couple of times before trial and that she told counsel the same thing she had stated at the evidentiary hearing. Counsel told Gordon that he would need more information from her and that she was to come to the petitioner's trial. However, Gordon never heard from counsel again.

Gordon testified that her telephone numbers changed sometime in 2001. She stated that her home telephone was disconnected and that she probably was not listed in the telephone book. The petitioner later blamed Gordon for not being at his trial. However, Gordon never knew about the petitioner's trial date and was not subpoenaed. She stated that she did not know what happened at the petitioner's trial but that she would have testified for him. On cross-examination, Gordon testified that she did not know who picked up the petitioner from her apartment.

The petitioner testified that counsel only met with him when he appeared in court and that counsel did not meet with him in prison. Each meeting lasted no more than twenty minutes. The petitioner told counsel about Stephanie Gordon and gave counsel her telephone number. The petitioner asked counsel if he had spoken with Gordon, and counsel said no. The petitioner said he

did not think counsel believed his story. He said that he thought counsel went over discovery materials with him and that counsel told him about the State's thirty-year offer. However, on the day of trial, counsel also told the petitioner about a twenty-five-year offer from the State, which the petitioner turned down. The petitioner told counsel "[f]rom the beginning" that he did not want to testify, but counsel told the petitioner he needed to testify. The petitioner also told counsel each time they met that he did not want to testify at trial, but counsel said the petitioner had to testify "to get my story out." Counsel did not ask the petitioner any questions in preparation for his testimony and did not ask him any potential cross-examination questions. The petitioner thought he gave counsel the name of the person who dropped him off at Stephanie Gordon's apartment on the night of December 21, 2000. On cross-examination, the petitioner acknowledged that the victims gave descriptions of the getaway car and the robbers and that a police officer testified at trial about recovering duct tape from Fuller. He stated that he did not know what time the robbery occurred.

The post-conviction court found that trial counsel adequately met with the petitioner on each of the petitioner's numerous court dates, reviewed discovery materials with him, and discussed the facts of the case and trial strategy with him. The court also found that counsel explained to the petitioner that it was the petitioner's decision to testify and that there was no evidence counsel coerced the petitioner into testifying. Regarding the petitioner's claim that counsel failed to have Stephanie Gordon testify, the court noted that counsel spoke with Gordon twice and "employed sufficient effort" to later locate her. The court also noted that counsel testified he thought Gordon was afraid to lie in court under oath. Regarding counsel's failure to call Gordon to testify in order to verify what counsel stated during his opening statement, the court concluded that the petitioner's testimony corroborated counsel's opening statement and that Gordon had not given any testimony at the evidentiary hearing that would have changed the outcome of the trial.

## **II. Analysis**

On appeal, the petitioner contends that he received the ineffective assistance of counsel because his trial attorney failed to investigate the facts of his case and failed to call an important witness, Stephanie Gordon, to testify on his behalf. The petitioner also contends that because counsel failed to call Gordon to testify, he had no choice but to take the stand in his own defense to corroborate trial counsel's opening statement. The State argues that the post-conviction court properly concluded that the petitioner did not receive the ineffective assistance of counsel. We agree with the State.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d

572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

The petitioner first claims that he received the ineffective assistance of counsel because trial counsel failed to investigate his case. However, counsel testified that he went to Stephanie Gordon's apartment. Although Gordon was not home, counsel spoke with her over the telephone once or twice, and she did not confirm the petitioner's story. Counsel also "went by" the victims' apartment and met with the petitioner numerous times to discuss the case. The petitioner contends that counsel should have subpoenaed Stephanie Gordon's telephone records to show that he called Fuller from her apartment. However, the petitioner failed to present Gordon's telephone records at the evidentiary hearing. The post-conviction court found that counsel adequately investigated the petitioner's case, and the petitioner has presented no evidence to preponderate against the post-conviction court's conclusion.

The petitioner also claims that counsel should have called Gordon to testify on his behalf. The post-conviction court concluded, without explanation, that Gordon's failure to testify did not prejudice the petitioner. Our review of the direct appeal record reveals that Mr. Woods testified the robbers entered his apartment after midnight and were in the apartment for about forty minutes before they forced him to show them to the apartment of Little Jason's cousin. Officer Jerry B. Clark, who was on patrol in the early morning hours of December 22 and was one of the first officers to arrive at the victims' apartment, testified that he was dispatched to the scene at 1:22 a.m. In his brief, the petitioner states the following:

Mr. Fuller, in his attempt to place the guilt on Mr. Betty, testified that he picked up Mr. Betty after midnight on December 22, 2000 on South Seventh. . . . Ms. Gordon would have testified at trial that this could not possibly have been true, as Mr. Betty [had] been with her in her apartment in Goodlettsville at the time in question.

The petitioner is incorrect. Stephanie Gordon testified at the evidentiary hearing that the petitioner left her apartment around midnight and no later than 1:00 a.m. and that her apartment was only a one- to two-minute drive from the victims' apartment. Therefore, the petitioner could have left Gordon's apartment at midnight or shortly thereafter and committed the crimes. Gordon did not provide the petitioner with an airtight alibi, and the petitioner has failed to establish that he was prejudiced by counsel's failure to call Gordon to testify.

Finally, the petitioner contends that counsel's failure to call Gordon as a witness forced him to testify in order to corroborate counsel's opening statement. However, counsel testified that while he told the petitioner that the petitioner probably should testify, the ultimate decision rested with the petitioner. The post-conviction court obviously accredited counsel's testimony over that of the petitioner. Therefore, the petitioner is not entitled to post-conviction relief.

### **III. Conclusion**

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE